U.S. Department of Labor

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Issue Date: 26 April 2005

CASE NO. 2005-CAA-9

IN THE MATTER OF:

ANTHONY ELLISON

Complainant

v.

WASHINGTON DEMILITARIZATION COMPANY, A SUBSIDIARY OF WASHINGTON GROUP, INTERNATIONAL, INC. (A.K.A. WESTINGHOUSE ANNISTON)

Respondent

RECOMMENDED DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION AND CANCELLING FORMAL HEARING

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of Section 322(a) of the Clean Air Act (CAA), 42 U.S.C. § 7622; Section 110(a) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; Section 1450(i)(1)(A-C) of the Safe Drinking Water Act, 42 U.S.C. § 300j-9; Section 7001(a) of the Solid Waste Disposal Act, 42 U.S.C. § 6971; Section 23(a) of the Toxic Substances Control Act, 15 U.S.C. § 2622; Section 507(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1367; Section 11(c) of the Occupational Safety and Health Act; and the regulations promulgated thereunder at 29 C.F.R. Part 24, et seq.

On April 18, 2005, Respondent filed a "Motion For Summary Disposition" averring that there exists no genuine issue of material fact and that the undisputed material facts of record warrant entry of judgment as a matter of law in favor of Respondent.

The bases of Respondent's Motion are as follows, that:

1. Complainant cannot establish a **prima facie** case, because:

    a. Complainant cannot establish that Respondent was his Employer.

    b. Complainant cannot establish that he engaged in any protected activity.

    c. Complainant cannot establish a causal nexus between any protected activity and his involuntary resignation.

2. Complainant cannot prevail even if he could establish a **prima facie** case, because:

    a. Respondent articulated a legitimate, nondiscriminatory reason.

    b. Complainant failed to establish pretext.

3. Complainant cannot prevail on any other claim.

The Notice of Hearing and Pre-Hearing Order which issued in this matter on March 4, 2005, permitted the filing of dispositive motions no later than April 18, 2005. Within five (5) days after service of such a motion, the other party could file opposing affidavits or other responses to the motion. The instant motion was served upon Complainant through his Attorney of record on April 15, 2005.

Ordinarily, five (5) days are added to a prescribed period when documents are filed by mail. See 29 C.F.R. § 18.4(c). However, on March 10, 2005, the undersigned issued an "Order Granting Motion For Filing and Service of Pleadings and Documents via Facsimile" to facilitate the expeditious nature of this matter and its filings.

To date, Complainant has filed no responsive pleadings to Respondent's motion. To be timely, a response should have been filed by April 22, 2005. Pursuant to 29 C.F.R. § 18.4(a) in computing any period of time, the time begins with the day following the act or event. When the period is less than seven

(7) days, as here, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.

In support of its motion, Respondent has offered various excerpts of Complainant's deposition taken on March 31, 2005, with specific exhibits thereto. In sum, Respondent argues Complainant has offered no evidence that Washington Demilitarization Company (WDC) was ever his Employer; that he ever made a protected complaint under any of the six environmental statutes; or that there is a causal nexus between any alleged complaint made by him and the decision to require his involuntary resignation. Thus, Respondent avers that Complainant has failed to offer substantial evidence raising a genuine issue of material fact with respect to the foregoing elements which warrants entry of summary decision against each one of Complainant's whistleblower claims.

DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d)(2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 99-STA-21 (ARB Nov. 30, 1999)(under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Webb v. Carolina Power & Light Co., Case No. 93-ERA-42 @ 4-6 (Sec'y July 17, 1995). This regulatory section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 91-ERA-31 and 91-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. Id. Again, the

determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 87-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id.

In considering the appropriateness of a motion for summary decision under the employee protection provisions of the Energy Reorganization Act, provisions which are analogous to those applicable in this matter, the Secretary has noted that where there is no protected activity or any discrimination as a result of protected activity, there is no cause of action. Richter v. Baldwin Assocs., Case No. 84-ERA-9 @ 3 (Sec'y Mar. 12, 1986). Under Richter, "any facts which are probative of whether a complainant engaged in protected activity or whether adverse action taken against the complainant was in retaliation for a protected activity are material facts. A dispute as to such probative facts demands the denial of a motion for summary decision and requires that a hearing be held to resolve the disputed facts." Id. The Secretary amplified this standard in Bassett v. Niagara Mohawk Power Co., Case No. 86-ERA-2 (Sec'y. July 9, 1986), wherein she stated that "it is not required that every element of a legal cause of action be set forth in an employee's . . . complaint." Id. @ 4.

Lastly, the U.S. Supreme Court has cautioned that "summary procedures should be used sparingly . . . where motive and intent play lead roles . . . It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." Pollar v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 Sup. Ct. 486, 491 (1962).

Accordingly, in order to withstand Respondent's Motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case. Bassett, @ 4. Whether the alleged acts actually occurred or whether they were motivated by the requisite animus are matters which cannot be resolved conclusively until after the parties have presented their evidence at a formal hearing.

Respondent argues that Complainant cannot establish that WDC was his employer at the time of the alleged discrimination. Respondent has presented evidence that Complainant's application for employment, letter of hire, employee profile, direct deposit slips and insurance coverage correspondence contain no support for a conclusion that WDC was his employer at the time of the alleged discrimination. There is no evidence that WDC controlled the time, manner and context of Complainant's employment. Rather, deposition testimony reveals Complainant assumed he was employed by WDC. (Complainant's deposition, p. 204). Respondent correctly argues that assumptions are no substitute for evidence. See Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998)(Conclusory allegations, conjecture, and speculation, however, are insufficient to create a genuine issue of fact); Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985)(Conclusory allegations without specific supporting facts have no probative value."

Respondent argues that Complainant has presented no evidence that he engaged in protected activity. He did not raise environmental concerns with any government agency or entity. He did not make any internal complaints to Respondent and no employee concerns were filed. Respondent argues Complainant has not alleged nor shown that his concerns were "grounded in conditions constituting reasonably perceived violations of environmental acts." Complainant's deposition testimony establishes that his concerns were occupational safety issues, rather than environmental, which are hazards not considered protected activity under the environmental acts.

The proffered evidence shows that Complainant worked at Anniston Chemical Weapons Incinerator as a CHB operator from March 2003 to October 2004. As a CHB operator, Complainant received a copy of the substance abuse procedure and signed a document agreeing to abide by such procedure. (Complainant's deposition, Exhibits 27-28). As CHB operator, Complainant was also aware of an employee concerns program and understood he was to report his concerns to Human Resources. Upon being hired, he agreed to abide by certain standards of conduct. As a CHB operator, Complainant was required to obtain and maintain a security status from the Chemical Personnel Reliability Program (CPRP), which was operated by the U.S. Army, not his Employer. (Complainant's deposition, Exhibits 6-7). Complainant was required to report any vulgar, abusive or threatening language or conduct, as was his Employer. (Complainant's deposition, Exhibit 8).

On October 10, 2004, Complainant's CPRP certification was revoked by the U.S. Army, not Complainant's Employer, based on inappropriate threatening and intimidating behavior that occurred on September 10, 2004, for which other employees were terminated. (Complainant's deposition, Exhibit 21). Respondent assisted Complainant in his appeal of the revoked certification which was denied on October 18, 2004, by the Certifying Officer of the U.S. Army. Respondent argues that no employee has been retained after their CPRP certification was revoked, which required Complainant's involuntary resignation and loss of other job opportunities with Employer.

Respondent further asserts that even assuming Complainant could establish a **prima facie** case, summary decision remains appropriate because the undisputed evidence establishes that Employer had legitimate, non-discriminatory, non-pretextual reasons for Complainant's involuntary resignation. Complainant has failed to offer evidence that Employer's reasons are not true and that protected activity was the true reason for his resignation. Complainant has offered no facts suggesting that the true reason for his involuntary resignation was retaliatory. There is no evidence of animus or Employer influence of the U.S. Army's decision to revoke Complainant's CPRP certification. Furthermore, Complainant has not offered any evidence that any similarly situated employee was retained under such circumstances. Moreover, Employer argues it selected another, more-qualified employee to fill a utility maintenance department job for which Complainant had applied.

Although Complainant filed a "Complaint of Discrimination" consisting of 157 paragraphs and 31 pages, there is no supportive attestation or affidavit of truthfulness accompanying the Complaint.

In view of the foregoing, and having reviewed Respondent's Motion and exhibits and in the absence of any timely response or affirmative evidence from Complainant, I find and conclude there are no disputed material facts that Complainant offered any evidence that WDC was ever his Employer, that he ever made a protected complaint under any of the six environmental Acts or that there is a causal nexus between any alleged complaint made by him and Employer's decision to require his involuntary resignation. Based on the pleadings before me, I further find and conclude that Complainant did not engage in protected activity nor did any discrimination occur as a result of any protected activity and, accordingly, Complainant cannot sustain

his cause of action. Therefore, Respondent is entitled to summary decision.

ORDER

In view of the foregoing findings and conclusions,

IT IS HEREBY RECOMMENDED that Respondent's Motion for Summary Decision be **GRANTED.**

IT IS FURTHER ORDERED that the formal hearing in this matter presently scheduled for May 2, 2005, be **CANCELLED.**

ORDERED this 26th day of April, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten (10) business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24,7(d) and 24.8.